for finding a partisan gerrymander unconstitutional.[9] *See Bandemer*, 478 U.S. 109; *see also Pope*, 809 F. Supp. 392. This bar is high for good reason: too low a threshold would invite attacks on virtually every single legislatively drawn map, swamp the federal courts in litigation, and force the judiciary ever deeper into the "political thicket." *See Bandemer*, 478 U.S. at 143 (noting that the standard was "of necessity a difficult inquiry"); *see also Vieth*, 541 U.S. at 300-01 ("[t]he vaguer the test for availability, the more frequently interest rather than necessity will produce litigation"); *Colegrove v. Green*, 328 U.S. 549, 556 (1946). Appellants have offered no justification for lowering the bar in this case.

B. The Texas Map Survives Any Cognizable Standard of Vote Dilution.

More than satisfying *Bandemer's* constitutional standard, the Texas Map meets any "substantive notion of fairness" and survives scrutiny under *any* cognizable standard of vote dilution. *See Vieth*, 541 U.S. at 299, 344. This is underscored by Texas's redistricting history – about which the District Court analyzing the Texas Map in *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005), stated:

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[9] During oral argument in *Vieth*, the following colloquy took place between Appellant's counsel, Paul M. Smith and Chief Justice Rehnquist:

Mr. Smith:	But the lower courts have since effectively overruled *Bandemer* by requiring factual showings of plaintiffs that are impossible and I submit irrational…
The Chief Justice:	Do you think the lower courts didn't follow *Bandemer* then? I mean, *Bandemer* set a very high standard. MP3 File: Oral Argument in *Vieth*, 541 U.S. 267 (argued Dec. 10, 2003), *available at* http://www.oyez.org/audio/cases/1648/argument.mp3.

> While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other. In 2000, the Democratic Party gerrymander was still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin. *Id.* at 767-68.

No one standard came out of *Vieth*, but four different potential standards were suggested – one by the plaintiffs, and one by each dissenting justice. The Texas Map does not meet any of these standards.

The Texas Map Yielded Election Results That Were Closer to Proportional Partisan Representation Than Those Under the 2001 Court Drawn Map.

While the Court has rejected proportionality as a requirement, it is relevant as a measure of "fairness" for purposes of surviving a vote dilution claim.[10] *See Johnson v.*

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[10] This Court has repeatedly rejected any claim that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *See Vieth*, 541 U.S. at 288 ("[the constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups"); *see also Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) ("we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them").

De Grandy, 512 U.S. 997, 1023 (1994). Indeed, "disproportionate election results" has been the gravamen of virtually every political gerrymandering complaint, underlying most standards suggested to adjudicate political gerrymandering claims. The Texas Map resulted in party representation in the Texas congressional delegation that closely reflected the percentage of the congressional vote each party won in 2004. As a result, the 2004 delegation was undeniably closer to being proportional than the 2001 delegation elected under the interim court drawn map (or elected under any other Texas congressional map in decades).[11] Moreover, judging fairness in this regard, the Texas Map exceeds both maps that were challenged, and upheld by the Court, in *Bandemer* and *Vieth*.[12]

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[11] *See, e.g.*, MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, (2003) at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

[12] In *Bandemer*, the Democrats had received 51.9% of the votes cast for the State House of Representatives statewide to the Republicans' 48.1%, yet out of 100 available seats, the Democrats had won only 43 to the Republicans' 57. Despite these results, the Court refused to find Indiana's map in violation of the Equal Protection Clause. *Bandemer*, 478 U.S. 109. Such quantitative "unfairness" also existed under the 2002 Pennsylvania congressional redistricting map challenged in *Vieth*. 541 U.S. 267. The *Vieth* map resulted in Republicans controlling 63% of Pennsylvania's congressional seats despite the fact that Republican statewide candidates captured only 46% of the vote against 51% for the Democrats. *See* Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State, 2004 General Election Returns, *available at* http://web.dos.state.pa.us/cgi-bin/ElectionResults/elec_archive.cgi?which=Archive (last visited Jan. 26, 2006).

There Is No History of Disproportionate Election Results Visited Upon Appellants.

Texas electoral history displays no signs of disproportionate election results affecting the Democratic Party. Indeed, if this history demonstrates anything at all it is that Appellants *benefited* from disproportionate election results for decades and the Texas Map merely corrected the Democrats' disproportionate hold on the Texas congressional delegation. Or, in the words of the *Henderson* Court:

> The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that had entrenched a minority party [the Democrats], in order to allow a party with overwhelming statewide voting strength [the Republicans] to capture two-thirds of Texas's congressional delegation, *is a characterization that the record supports. Henderson*, 399 F. Supp. 2d at 770 (emphasis added).

Moreover, Appellants' complaint is based only upon the results of the 2004 election. Yet this Court has been clear that a partisan gerrymandering claim is particularly difficult to support when it comes after just a single election held under a newly redrawn map. *See Bandemer* 478 U.S. at 135 ("[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory"). Indeed, without a finding that a reapportionment will consign a political party to the minority during a decade or that that party "has no hope" of doing better in the next round of redistricting, it is an error to find an equal protection violation. *Id.* at 135-36; *cf. Vieth*, 541 U.S. at 363-64 (Breyer, J., dissenting). Appellants do not, because they cannot, demonstrate anything of the sort.

There is No Indicia of Lack of Political Power and Denial of Fair Representation.

In order to demonstrate lack of political power and denial of fair representation, a plaintiff must show that his or her political group has "essentially been shut out of the political process." *See id.* at 139. Yet Appellants have offered no evidence, nor have they alleged, that there has been any interference with their fundraising, registration, organizing, voting, campaigning, or other activities. *See Badham,* 694 F. Supp. at 671-72. Indeed, despite their recent lack of success at the polls, the Texas Democratic Party has successfully raised money, registered voters, organized, and mounted vigorous campaigns up and down the ballot in Texas in 2004. Rather than being shut out from the process, the Texas Democratic Party is fully engaged in it. For example, on January 7, 2006 the Galveston County Democratic Party hosted a "Turn Texas Blue" event. *See* http://www.galvestoncountydemocraticparty .com/Special/TTB/index.htm. "Turn Texas Blue" featured prominent national and state Democratic speakers such as Democratic National Committee Chairman Howard Dean, Texas Democratic Party Chairman Charles Soechting, 2004 Democratic vice-presidential nominee John Edwards, General President of the United Steelworkers Union Leo Gerard, and – notably – 2006 Texas Democratic *congressional candidates* Nick Lampson and Shane Sklar. *See Texas Democrats To Meet On The Island*, THE [Galveston County, TX] DAILY NEWS,

Dec. 28, 2005. Finally, reports indicated strong grassroots and registration activity by the Texas Democrats in 2004.[13]

1. The *Vieth* Plaintiffs' Standard.

In *Vieth,* the plaintiffs' suggested test used *Bandemer's* two-prong framework and identified specific factors for determining whether a discriminatory effect had been visited upon the purportedly disadvantaged political party. Under this test, the requisite effect would be shown when (1) the plaintiffs show that the districts systematically "pack and crack" the rival party's voters, and (2) the court's examination of the "totality of the circumstances" confirms that the map can thwart the plaintiff's ability to translate a majority of votes into a majority of seats. *See Vieth,* 541 U.S. at 286. Even setting aside the Court's unwillingness to view the results of a single election as sufficient evidence of discrimination, Appellants have not, because they cannot, demonstrate that the Texas Map systematically cracks and packs Democratic voters. Justice Scalia noted about this test in *Vieth* that plaintiffs' test would invalidate a map only "when it prevents a majority of the electorate from electing a majority of the representatives." *Id.* at 287. Yet Appellants cannot make such a showing here; the

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[13] Travis County Democratic Party Chairman Chris Elliot issued a glowing press release with respect to this activity, stating: "I cannot stress enough how great [the 2004] election was for the Travis County Democratic Party as a whole. We saw more grassroots enthusiasm and anticipation in this election than in any other in recent memory. In addition, the Democratic enthusiasm in Travis [County] *seems to be spreading to neighboring counties* as Hayes and Williamson [counties] ramped up their Democratic activism during this election cycle." Chris Elliot, *A Message from TCDP Chair Chris Elliot*, Travis County Democratic Party Press Release, Nov. 2004 (emphasis added). This view was supported by the Travis County Constable, Bruce Elfant, who stated: "I think the Texas Democratic Party is on the rebound...[w]e're seeing record voter registration drives and an interest level that I haven't seen in years." April Castro, *Texas Democrats Hopeful Despite Low Point*, THE ASSOCIATED PRESS, July 30, 2004.

most they can show is that the Texas Map brings the state's congressional representation closer to proportionality than virtually any Texas map in decades. Indeed, under the *Vieth* plaintiffs' standard the Texas 2001 interim court drawn map would likely have been *overturned* as a partisan gerrymander.

2. The *Vieth* Dissenters' Standards.

In *Vieth*, Justice Souter's dissent articulated a standard for identifying unconstitutional partisan gerrymandering that focused on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 343-55. This standard offered a five-step prima facie test for adjudicating partisan gerrymandering claims. To meet this test, Appellants would be required to show that (1) they are members of a cohesive political group; (2) that the district of their residences paid little or no heed to traditional districting principles; (3) that there were specific correlations between the district's deviations from traditional districting principles and the distribution of the population of their group; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of their group, and deviates less from traditional districting principles; and (5) that Appellees acted intentionally to manipulate the shape of the district in order to pack or crack their group. First, the Court has indicated that packing and cracking must be dilutive in order to trigger a violation, *see Shaw v. Reno*, 509 U.S. 630 (1993), and as discussed above, the Texas Map is not dilutive. Second, it is illogical to believe that the Texas Map fails this test when the very relief that Appellants ask this Court to grant is a return to a map – the 2001 court drawn interim map – that under this test is *more* of a partisan gerrymander.

The standard outlined in Justice Stevens's dissent also focuses on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 317-41. Under this standard,

partisan gerrymandering claims would be analyzed under strict scrutiny – if partisan motivation was the predominant consideration in drawing district lines, absent a showing of neutral justificatory criteria, the district would be invalid. In this case, however, no sophisticated analysis is necessary to demonstrate that the Texas Map passes the test. A cursory visual inspection of the Texas Map suffices to show that the Texas Legislature adhered to traditional redistricting criteria, particularly when compared to Texas's last legislatively enacted congressional map, the 1992 map.[14]

Justice Breyer's dissent sets forth several hypotheticals, arranged on a continuum, which might indicate unconstitutional political gerrymandering. *Vieth*, 541 U.S. at 355-68. The first scenario, one sufficient to support a claim, would require Appellants to show that (1) they failed to win a majority of the seats after winning a majority of the votes in two consecutive elections; and (2) that no neutral explanation for this situation exists. Each of Justice Breyer's other scenarios fall further from supporting a claim, but all search for the same thing – "unjustified entrenchment." But the evidence is clear that, if anything, it was the *Democratic* congressional delegation that had been unjustifiably entrenched, and that the Texas Map merely dislodged their entrenchment. Since 1994, or *five* election cycles, Republicans have won a majority of the votes for congress, but until 2004 failed to win a majority of the seats. The Democrats, conversely, have not won a majority of

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[14] The Texas Map is also superior in this regard to the court approved 1996 Texas map that resulted from the Court's decision in *Bush v. Vera*, 517 U.S. 952 (1996).

the Texas congressional vote since 1992, yet they held a majority of the seats until 2004.[15]

II. THE VOTING RIGHTS ACT OF 1965 IS A STATUTORY SHIELD TO PROTECT MINORITY POPULATIONS, NOT A PARTISAN SWORD.

District 23 is represented by Henry Bonilla, a Hispanic Republican. Appellants argue that Mr. Bonilla does not constitute a "candidate of choice" for Hispanic-Americans because he is a Republican. Conversely, Appellants argue that Martin Frost, an Anglo Democrat who represented District 24 under the 2001 map, was a minority candidate of choice . . . because he is a Democrat. These odd results are brought about by Appellants' interpretation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (§ 2) (the "Act"), which says that in order for a congressional district to "perform" for minorities the district must elect a Democrat. Case law, together with the Act's language and legislative history, leave Appellants without support. If Appellants' interpretation of Section 2 is endorsed, the Act's role in protecting and increasing minority participation and access would be undermined. Moreover, interpreted in this manner, the Act's constitutionality would be drawn into question.

Such a theory of partisan-blind racial bloc voting was expressly rejected by Justice White's and Justice O'Connor's concurring opinions in *Thornburg v. Gingles.* 478 U.S. 30, 83 (1986) (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). In fact, the hypothetical set forth in

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[15] *See, e.g.*, MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

Justice White's concurrence is *virtually identical* to Texas District 23:

> I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did...[16] *Id.* at 83.

Appellants' argument, that in every area where there is a cognizable minority population Section 2 requires districts be drawn so that the minority-*preferred* Democrat usually wins, has also been consistently recognized and rejected by lower courts with the same justification.[17]

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[16] Justice White's opinion is the controlling opinion on this issue. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). *See also Uno v. Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics"). Given the Court's ruling on what constituted a cohesive voting group in *Quilter v. Voinovich*, 981 F. Supp. 1032 (N.D.Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), it is questionable whether polarized voting even exists in District 23.

[17] *See, e.g., Hall v. Virginia*, 276 F. Supp. 2d 528, 530 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004); *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 382, 386, 401, 403, 427 n.134 (S.D.N.Y. 2004); ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members"); *Baird v. Consol. City of*

Appellants also argue that former District 24 should be protected by Section 2. In short, that minority-majority districts – the method by which the Texas legislature here chose to comply with the Act – actually *violate* Section 2.[18] The record is clear, however, that District 24 was *never* a minority performing district, it was merely a *Democratic* one.[19] Further, the record is clear that the Texas legislature took care to comply with the Act's requirements. For example, a new Hispanic controlled district, District 25, was drawn, and a new Democratic district was created, District 9, that elected an African-American Democrat. All of the other performing minority districts, including Congressman Bonilla's district, were drawn in a manner so that they would continue to elect minority representatives as they had previously. Indeed, the Texas Map enhances minority representation. The prior map had resulted in five Hispanic Democrats, one Hispanic Republican, and two African-American Democrats, being elected – a total of eight. Under the current map, five Hispanic Democrats, three African-American Democrats, and one Hispanic Republican, were elected – for a total of nine. Plus an

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Indianapolis, 976 F.2d 357, 361 (7th Cir. 1992); *see also* Michael A. Carvin and Louis K. Fisher, *A Legislative Task: Why Four Types Of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 12-27 (2005).

[18] Minority-majority districts are districts in which a majority of the voting age population are a racial minority. *See Johnson v. De Grandy*, 512 U.S. 997, 1023 (1994).

[19] The trial record offers the following support for this contention. First, African-Americans constituted only 21.4% of the population in District 24. *See* Joint Appendix, at 51a. Second, Anglos constituted the District's largest ethnic group, and made up a majority of the District's voting age population. Finally, no African-American candidate ever challenged Martin Frost in a Democratic primary, so there is no baseline against which to test Frost's African-American support. *See id.*, at 55a.

additional seat controlled by the Hispanic electorate was created, District 25.

That the Act cannot be used to aid one political party at the expense of another, even if one party is supported by some minority groups, is only further underscored by its legislative history. Resulting from the violence that surrounded efforts in early 1965 to register African-American voters in Selma, Alabama, the Act was clearly meant to address matters of race, not political party affiliation. Indeed, President Lyndon Johnson was focused solely on ending practical barriers to minority voting – which he identified and broke into three categories: (1) technical, (*e.g.*, poll taxes) (2) non-cooperation, and (3) subjective (*e.g.*, literacy tests). *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATED TO THE RIGHT TO VOTE, 89th Cong. (1st Sess. 1965). This singular focus on ending the practical barriers to voting faced by minorities is further demonstrated by President Johnson's speech to a special joint-session of Congress concerning the Act, in which he stated:

> The issue of equal rights of American Negroes is [a challenge to the values and purposes of America.] And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, then we will have failed as a nation. And we meet here tonight *as* Americans – *not as Democrats or Republicans* – we are met here as Americans to solve that problem.[20] *Id.* (emphasis added).

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[20] In this same statement, President Johnson goes so far as to name legislators from both parties in calling for the Act's passage: "[a]nd so at the request of your beloved Speaker and Senator from Montana, the Majority Leader, Mr. Mansfield, and the Senator from Illinois, the Minority Leader, Mr. Dirksen, and Mr. McCullouch and others, Members of both parties…I come here to ask you to share this task with me and to share it with the people we both work for." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATED TO THE RIGHT TO VOTE, 89th Cong. (1st Sess. 1965).

The Act's legislative history, saturated with discussion about ending barriers to minority voting, is virtually absent of any reference to political party representation. Indeed, the legislative history expressly disclaims congressional intent to establish any right to have members of even protected classes elected in numbers equal to their proportion in the population.[21] In fact, "it was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to

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[21] It is abundantly clear that "during the hearings, a unanimous consensus was established, among both the opponents and proponents of the results test, that the test for Section 2 claims should not be whether members of a protected class have achieved proportional representation." S. REP. NO. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364. This is so because "[t]he fifteenth amendment and the Voting Rights Act of 1965 protect voter access only. . . . Neither the Amendment nor Section 2 of the Act explicitly or impliedly asserts that the voter is entitled to any additional rights or privileges after his vote has been taken, or that the outcome or result of the election with respect to the success or failure of minority candidates bears any relation to an individual's right to vote. . . . Why? Because the right to vote is an individual right of equal access to the ballot, not the collective right of a particular [group] to a certain share of elected officials after each individual has exercised his right to vote and gone home." S. REP. NO. 97-417, at 221-22 (1982) (minority views of Senator John P. East), *as reprinted in* 1982 U.S.C.C.A.N. 177, 391-92; *see also id.* at 28 (Judiciary Committee Report), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206 ("Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy."); *id.* at 16 (Judiciary Committee Report), as reprinted in 1982 U.S.C.C.A.N. 177, 193 ("[T]he Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process"); *accord* H.R. REP. NO. 97-227, at 30 (1981) ("The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.").

their voting potential was repugnant to the democratic principles upon which our society is based. Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress." S. REP. NO. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364.

Finally, to argue that elected Republicans would play such an integral role in legislation designed to elect more Democrats defies common sense. The Act itself, it is widely acknowledged, was *drafted* in Senator Everett Dirksen's office, the Republican Senate Minority Leader from Illinois.[22] One historian describes the Republican Senator's role as follows:

> The Civil Rights Acts of the 1960s were [Dirksen's] Acts. He did more than sponsor them. He did more even than produce the necessary votes to enact them. He also did what few of his colleagues were capable of doing: he played the principal role in drafting their language, and *thus determined their exact legislative thrust and intent.* NEIL MACNEIL, DIRKSEN: PORTRAIT OF A PUBLIC MAN 4 (The World Pub. Co. 1970) (emphasis added).

It is hard to imagine that Senator Dirksen intended for the Act to benefit his opposing political party. Indeed, by one

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[22] Not only did Senator Dirksen play a large role in the Act's drafting, but he actively lobbied his colleagues to support it. *See* BYRON C. HULSEY, EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS 210-11 (Univ. Press of Kansas 2000) ("Legislative aides and lawyers from the Justice Department gathered daily in Dirksen's office to draft the legislation. At the close of every day Dirksen would return from the Senate floor and ask, 'well, boys, what have you done today?' After he was briefed, he would open up the bar, and when one or two conservative Republicans stopped by for a drink, the lawyers from Justice had a chance to lobby for the bill").

account, in a conversation with his Republican Senate colleagues Senator Dirksen stated: "Republican senators [will] have to assume leadership because the Democrats [will] not do so." BYRON C. HULSEY, EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS 210-11 (Univ. Press of Kansas 2000). The Act is not a partisan tool. There is no reason for the Court to depart from the meaning given to the Act by Congress and the courts – the protection of racial minorities.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to affirm the District Court decision.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276 and 05-439

In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICUS CURIAE* UNIVERSITY PROFESSORS CONCERNED ABOUT EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTION PRESENTED

May a legislative body, in mid-decade, voluntarily and without a compelling reason replace a valid districting plan with a new one relying on the population data from the last census?

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INTEREST OF *AMICUS CURIAE*

This *Amicus Curiae* brief is submitted on behalf of the University Professors Concerned About Equal Representation For Equal Numbers of People. The individual *Amici* are Professors David A. Anderson (University of Texas), Julius P. Getman (University of Texas), Teresa R. LeClercq (University of Texas), Sanford V. Levinson (University of Texas), Lucas A. Powe, Jr. (University of Texas), Jordan Steiker (University of Texas), Jay L. Westbrook (University of Texas), and John Aldrich (Duke University).[1] This *Amicus* organization is submitting this brief because of concern over the impact of this case on the fundamental principle that legislative bodies must make a good faith effort to provide the citizens of a state with election districts as equal in population as practicable. The resolution of this case will be significant to the constitutional jurisprudence of this country.

The "University Professors" participated fully in this case on remand as an *Amicus*. The District Court below *sua sponte* required the State Defendants to respond to the *Amicus* brief and required the Plaintiffs to provide time at the hearing on January 21, 2005 for an oral presentation by Professor Powe on behalf of *Amicus*. Much of the lower court's written opinion deals with the written and oral arguments presented by *Amicus*. The equal representation for equal numbers of persons issue addressed by *Amicus*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amicus* states that none of the parties authored this brief in whole or in part and no one other than the *Amici* or counsel contributed money or services to the preparation and submission of this brief.

below and in this brief is essentially raised by two of the Appellants[2] in this consolidated case. The *Amici* believe that the information provided in this brief will assist this Court in resolving the difficult questions posed in this case.

SUMMARY OF ARGUMENT

The congressional redistricting plan passed by the Texas legislature in 2003 was drawn voluntarily and for partisan reasons. It replaced a lawful existing plan. These facts distinguish this case from the many other redistricting cases decided by this Court in the past forty years. The new plan utilized population data that were outdated and inaccurate. This Court has never directly considered whether a partisan use of the electoral process under such circumstances is constitutional.

Appellees claimed in the court below that any legislatively enacted redistricting plan complies with the constitutional requirement for equal population among election districts so long as it contains districts that are equal in population based on the enumeration from the last federal decennial census. *Amicus* urges that the constitutional mandate requires that a legislature cannot voluntarily redistrict using population data that is known to be outdated and inaccurate unless a compelling state reason exists for the redistricting and the use of the data. Otherwise such

[2] The Travis County Appellants and the League of Latin American Citizens Appellants have raised similar "one person, one vote" or "equal population" challenges to the 2003 Texas redistricting. This *Amicus Curiae Brief* is submitted in support of these Appellants, but is not submitted in opposition to the position of any Appellant.

redistricting, to further the partisan designs of a temporary legislative majority, is a breach of a legislature's fundamental duty to make a good faith effort to provide its citizens with election districts as equal in population as practicable.

Appellees' legal position is a threat to representative government in this country. This brief discusses several of the dangers inherent in Appellees' position. One threat, however, stands out as a result of oral argument in the court below. In response to a question from that court, Appellees' counsel correctly acknowledged that, if the Appellees' legal position is correct, a state legislative body can voluntarily redraw state legislative districts at the end of a decade (e.g., 2009) using data from the prior federal decennial census. Such a possibility means that a temporary political majority in a highly charged partisan environment can voluntarily redraw state legislative districts immediately prior to elections at the end of a decade (e.g., 2010) notwithstanding population shifts in the state over the decade. Through this maneuver, a temporary partisan or interest majority can redistrict to preserve or enhance its political advantages and thereby unfairly control the redrawing of state and congressional districts after the new census.

Many other state and local government officials have already publicly expressed an interest in the possibility of following the Texas example and redrawing existing election districts during this decade to benefit one partisan or special interest over another. Others will surely do so if this Court upholds the Texas congressional redistricting plan. Such a prospect of a "rolling redistricting" on the basis of old, inaccurate population data is anathema to the constitutional principle of one person, one vote and a

threat to representative government. It would constitute further unfortunate confirmation of representatives picking their voters rather than vice versa.

Adoption by this Court of the position urged by *Amicus* in this brief can end this threat through the common sense, easily administered application of existing constitutional principles.

ARGUMENT

I. Voluntary Redistricting Using Inaccurate Population Data is a Threat to Fundamental Constitutional Rights and Representative Government.

Few, if any, officials have suggested that voluntary redistricting mid-decade is a good policy. Virtually any redistricting is likely to be divisive, distracting, confusing to voters, and costly of legislative time and energy. As shown by the extraordinary events in Texas in 2003, a voluntary mid-decade redistricting undertaken to maintain or enhance a temporary majority's political strength is likely to be even more disruptive. Voluntary redistricting mid-decade by a state or local legislative body using inaccurate population data is a way of thwarting political changes that would normally accompany population changes and shifting voter preferences. As Justice Breyer recognized in his dissent in *Vieth v. Jubelirer*,[3] a political party might redistrict periodically during a decade to

[3] 541 U.S. 267 (2004).

preserve its political advantages notwithstanding population shifts in the state. A temporary majority in a state legislative body may redistrict state legislative districts at the end of a decade to permit itself to maintain or enhance its dominance for the critical time of redistricting after the new census. The court below asked Appellees' counsel whether Appellees' legal position in this case would permit such a redistricting for partisan advantage at the end of a decade, and Appellees' counsel correctly answered that it would.[4]

The 2003 redistricting in Texas is a perfect example of how Justice Breyer's concerns were fulfilled. The final redistricting plan passed in Texas was unlike either of the plans passed earlier in the legislative session by the Texas Senate or the Texas House. The conference committee that was charged with resolving differences between the two plans never met. Instead, the final plan was accomplished literally behind closed doors by a handful of like-minded partisan activists using computers to manipulate data from a variety of political data bases designed to predict how each election precinct statewide would perform in future congressional elections. Plans were endlessly tweaked on computer monitors to achieve the best possible partisan result. All of this secret activity occurred under scrutiny and pressure from external partisan interests. The 2003 memoranda[5] from Mr. Jim Ellis to Congressman Tom DeLay provide a valuable insight into what was actually happening throughout 2003 and at this final stage. In his memorandum of October 5, 2003, Ellis notes

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[4] Transcript at 138-139 (January 21, 2005).

[5] Jackson Pls. Exhibit No. 136.

that he and Congressman DeLay had already achieved the goals of "helping Bonilla (District 23) and eliminating the Frost district (District 24)" through changes achieved at the conference committee. However, Ellis urged that further "major adjustments must be made to ensure that the map reflects the priorities of the congressional delegation and not the legislature." Ellis lamented that the map under consideration at the time was still flawed with "largely insignificant state legislative agendas." Ellis concluded his October 5th memorandum to DeLay with the insistence that "[w]e need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."[6]

Congressman DeLay journeyed again to Austin. For the next few days he met with the state officials. Ellis got his wish. The final redistricting map was unveiled on October 9th, only three days before it was finally passed by an exhausted Texas Legislature. This final plan embodied an extreme partisan aggressiveness. Unlike the maps adopted earlier by the Texas House and Texas Senate, this final plan bolstered Republican Congressman Bonilla's District 23 with Anglo Republican counties, dismantled District 24 (Congressman Frost), and targeted every Anglo Democratic incumbent for defeat by dismantling their existing districts and leaving their residence in a heavily Republican district. The plan was a partisan masterpiece that not only resulted in the immediate (2004) gain by Republicans of six seats in Congress from Texas,[7] but will

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[6] Id.

[7] The plan resulted in a loss of six Democratic seats in Congress. Four Democratic incumbents were defeated for reelection in the 2004

(Continued on following page)

control the outcome in Texas congressional elections for the foreseeable future notwithstanding expected population shifts that otherwise should favor Democrats.

Voluntary redistricting may use unreliable federal decennial census data to disguise redistricting plans drawn to unfairly discriminate in a real sense against certain categories of voters. By using more current political and demographic data, such as voting trends (in voter registration, voter turnout, and partisan tendency), to determine district boundaries, a temporary legislative majority may pack opposing voters in as few districts as possible or counter an anticipated future growth in opposing voters in an election district by removing the voters from the endangered district. This discrimination may be disguised by the use of old, currently inaccurate census data to justify the new district configurations.

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general election (Congressmen Max Sandlin, Nick Lampson, Martin Frost and Charles Stenholm). One Democratic congressman (Jim Turner) declined to seek reelection in his redrawn district that contained only 4% of the residents of his previous district. One Democratic congressman (Ralph Hall) switched parties after the redistricting and won reelection in 2004 in his redrawn district as a Republican. Democratic Congressman Chris Bell was drawn out of his district and placed in a heavily Republican district. He sought reelection in a nearby congressional district, but lost in the Democratic Primary to African-American candidate Al Green. Only three of the ten Anglo Democratic incumbents won reelection as Democrats in 2004. Two of these won reelection only by running in nearby districts that are overwhelmingly Hispanic. The overall result of the redistricting was the defeat, retirement or switch of seven of the ten targeted Anglo incumbent congressmen, the gain by Republicans of six seats in Congress, and the marginalization of the Democratic Party in Texas by the packing of Democratic voters into ten districts, each with a minority population (according to the 2000 census) of over 70%. Only one Democrat, Congressman Chet Edwards, won election in a district with less than a 71% minority population.